UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THOMAS F. KOSINSKI, Plaintiff	)	
v.	)	Civil Action No. 10-30097-KPN
MICHAEL J. ASTRUE, Commissioner of Social Security Administration, Defendant	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION TO REVERSE THE DECISION OF THE COMMISSIONER and DEFENDANT'S MOTION TO AFFIRM THE DECISION OF THE COMMISSIONER
(Document Nos. 10 and 12)
August 19, 2011

NEIMAN, U.S.M.J.

This is an action for judicial review of a final decision by the Commissioner of the Social Security Administration ("Commissioner") regarding an individual's entitlement to Social Security Disability Insurance ("SSDI") benefits pursuant to 42 U.S.C. § 405(g). Thomas Kosinski ("Plaintiff") asserts that the Commissioner's decision denying him such benefits -- memorialized in a March 20, 2008 decision of an administrative law judge -- is not supported by substantial evidence. He has filed a motion to reverse the decision and the Commissioner, in turn, has moved to affirm.

The parties have consented to this court's jurisdiction. *See* 28 U.S.C. § 636(c);

Fed. R. Civ. P. 73. For the following reasons, the court will allow the Commissioner's motion to affirm and deny Plaintiff's motion to reverse.

I. STANDARD OF REVIEW

A court may not disturb the Commissioner's decision if it is grounded in substantial evidence. *See* 42 U.S.C. § 405 (g). Substantial evidence is such relevant evidence as a reasonable mind accepts as adequate to support a conclusion. *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981). The Supreme Court has defined substantial evidence as "more than a mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Thus, even if the administrative record could support multiple conclusions, a court must uphold the Commissioner's findings "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." *Irlanda Ortiz v. Sec'y of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991) (citation and internal quotation marks omitted).

The resolution of conflicts in evidence and the determination of credibility are for the Commissioner, not for doctors or the courts. *Rodriguez*, 647 F.2d at 222; *Evangelista v. Sec'y of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987). A denial of benefits, however, will not be upheld if there has been an error of law in the evaluation of a particular claim. *See Manso-Pizarro v. Sec'y of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In the end, the court maintains the power, in appropriate circumstances, "to enter . . . a judgment affirming, modifying, or reversing the [Commissioner's] decision" or to "remand[ ] the cause for a rehearing." 42 U.S.C. §

405(g).

II. BACKGROUND

On June 26, 2006, Plaintiff filed for SSDI benefits. (Administrative Record ("A.R.") at 83.) Plaintiff claimed that he was disabled due to a chronic back condition and asthma. (*Id.* at 50.) After Plaintiff's claim was denied both initially and upon reconsideration (*id.* at 53-54), he requested a hearing in front of an administrative law judge ("ALJ"), which occurred on February 21, 2008. (*Id*. at 20-45.)

At the time of the hearing, Plaintiff, forty-six years old, testified that he graduated high school and had semi-skilled work experience as a mail handler for the Postal Service, where he had been employed for approximately twenty-two years. (*Id.* at 24, 40-41.) Plaintiff stopped working on June 5, 2005, because of the onset of spondylolisthesis, the partial dislocation of spinal vertebra. (*Id.* at 118, 128.) He was medically retired from his position in about August or September of 2005. (*Id.* at 128.) In addition to his lower back pain, Plaintiff suffers from asthma, coccygodynia, chronic right knee pain, and episodic bi-lateral hand numbness. (*Id.* at 29, 38, 251, 290.)

At the hearing, the ALJ posed to a vocational expert a hypothetical involving an individual of Plaintiff's age, with the same education and work experience, who could occasionally lift twenty pounds and frequently lift ten, stand and walk for six hours in an eight-hour day and sit for six hours in an eight-hour day, as well as occasionally bend, kneel and crawl. (*Id*. at 41.) The vocational expert stated that such an individual could perform Plaintiff's past work, as well as that of a cafeteria attendant and library aide. (*Id*.) The ALJ then modified the hypothetical to an individual with the same limitations

but who could only sit for three hours and stand for three hours in an eight-hour workday and could not climb, kneel or crawl. (*Id.* at 41-42.) The vocational expert said that such an individual would be unable to work on a full-time basis because he could only sit/stand for six hours a day. (*Id.* at 42.) The ALJ then modified the hypothetical a second time to include an individual with the same limitations but who could sit for four hours and stand for four hours. (*Id*.) The vocational expert replied that such an individual would not be able to perform his past work but could be a library aide, a small products assembler, or a machine tender (filling machine operator). (*Id.* at 43.)

In a decision dated March 20, 2008, the ALJ denied Plaintiff's claim. (*Id.* at 12-18.) The ALJ found that Plaintiff had not been disabled within the meaning of the Social Security Act (the "Act") since June 6, 2005. (*Id.* at 12.) The ALJ determined that Plaintiff suffered from "severe" chronic back pain and asthma but that his knee pain was not severe. (*Id.* at 14, 16.) In addition, the ALJ found that, while Plaintiff was unable to perform any of his past relevant work, he had the residual functional capacity to perform light work as defined in 20 C.F.R. §§ 404.1560 (c) and 404.1566, and there were jobs that existed in significant numbers in the national economy that Plaintiff could perform. (*Id.* at 17)

Plaintiff requested review of the ALJ's decision by the Commissioner's Appeals Council on April 22, 2008. (*Id.* at 7.) On March 24, 2010, the Appeals Council denied Plaintiff's request. (*Id.* at 2.) In due course, Plaintiff filed the instant action, the Commissioner compiled the administrative record, and the parties submitted the cross-motions presently at issue.

III. DISCUSSION

An individual is entitled to SSDI benefits if, among other things, he has an insured status and, prior to the expiration of that status, was under a disability. *See* 42 U.S.C. § 423(a)(1). Plaintiff's insured status is not challenged.

A. Disability Standard and the ALJ's Decision

The Act defines disability, in part, as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A). An individual is considered disabled under the Act:

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. §§ 423(d)(2)(A). *See generally Bowen v. Yuckert*, 482 U.S. 137, 146-49 (1987).

In determining disability, the Commissioner follows the five-step protocol described by the First Circuit as follows:

> First, is the claimant currently employed? If he is, the claimant is automatically considered not disabled.
>
> Second, does the claimant have a severe impairment? A "severe impairment" means an impairment "which significantly limits the claimant's physical or mental capacity to perform basic work-related functions." If he does not have an impairment of at least this degree of severity, he is automatically not disabled.

> Third, does the claimant have an impairment equivalent to a specific list of impairments in the regulations' Appendix 1? If the claimant has an impairment of so serious a degree of severity, the claimant is automatically found disabled.
>
> . . . .
>
> Fourth . . . does the claimant's impairment prevent him from performing work of the sort he has done in the past? If not, he is not disabled. If so, the agency asks the fifth question.
>
> Fifth, does the claimant's impairment prevent him from performing other work of the sort found in the economy? If so he is disabled; if not he is not disabled.

Goodermote v. Sec'y of Health & Human Servs., 690 F.2d 5, 6-7 (1st Cir. 1982).

In the instant case, the ALJ found as follows with respect to these questions: Plaintiff has not engaged in substantial gainful activity since the alleged onset of his disability (question one); Plaintiff has impairments which are "severe," specifically chronic back pain and asthma, but which do not meet or medically equal one of the listed impairments in Appendix 1 (questions two and three); and Plaintiff, although unable to perform his past relevant work, had the residual functional capacity to perform jobs that exist in significant numbers in the national economy (questions four and five). Therefore, the ALJ determined, Plaintiff was not entitled to SSDI benefits. (A.R. at 14-18.)

B. Plaintiff's Challenge to the ALJ's Decision

Plaintiff argues that the ALJ erred in failing to (1) categorize his coccygodynia, chronic right knee pain, and episodic bi-lateral hand numbness as severe impairments, (2) adequately evaluate his pain, and (3) determine how frequently he would need to

alternate between sitting and standing. Plaintiff also asserts that the ALJ's findings regarding his residual functional capacity were not supported by substantial evidence. In response, the Commissioner asserts that the record supports the ALJ's conclusion. For the reasons which follow, the court finds the Commissioner's argument more persuasive.

1. The ALJ's Consideration of Plaintiff's Coccygodynia, Knee Pain and Hand Numbness

Plaintiff contends that the ALJ failed to consider his coccygodynia a severe impairment. Coccygodynia is a specific type of back pain concentrated in the lower back. In response, the Commissioner argues that, while the ALJ did not explicitly mention coccygodynia in her decision, she did consider the condition insofar she found that Plaintiff suffered from severe chronic back pain. The ALJ also referred to a "bone spur" in a list of Plaintiff's alleged impairments.

An impairment is not severe if it does not "significantly limit [one's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1521. Here, Plaintiff was diagnosed with coccygodynia on October 16, 2007, it having developed after his back surgery in March of the previous year. (A.R. at 301.) After a kenalog injection on October 24, 2007, however, the pain decreased so that by June 4, 2008, it was described as "tolerable." (*Id.* at 303-04.) Plaintiff's orthopedic surgeon, Dr. Charles A. Mick, M.D., subsequently stated that "no treatment is required" (*id*.), and Plaintiff himself did not mention coccyx pain during his testimony. Thus, the ALJ could reasonably find that the coccygodynia was not severe.

The ALJ also found that "there is no evidence which suggests that the claimant's knee condition caused significant limitations of functioning for more than a couple months." (A.R. at 16.) This finding, too, is supported by the evidence; after knee surgery on February 1, 2007, Plaintiff did not receive further medical treatment after March 26, 2007. (*Id.* at 246.) Such lack of or gaps in medical treatment may be considered evidence when determining the severity and scope of a disability. *Irlanda Ortiz v. Sec'y of Health and Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). In any event, during an October 16, 2007 examination, Plaintiff was found to have a "smooth gait" and "normal" heel and toe walking. (A.R. 302.)

Finally, Plaintiff argues, the ALJ did not identify his hand numbness as severe. In his testimony, however, Plaintiff stated that the numbness bothers him only "on occasion" at night (*id.* at 38), and notes from a physical examination on June 4, 2008, reflect that the numbness happens only "intermittently" when he is "lying on his side in bed," (*id.* at 304). Accordingly, the ALJ could reasonably conclude that the numbness did not "have more than a minimal effect on [Plaintiff's] physical . . . ability[] to perform basic work activities." *Teves v. McMahon*, 472 F. Supp. 2d 82, 87 (D.Mass. 2007).

2. The ALJ's Evaluation of Plaintiff's Pain and Medications

An administrative law judge must consider a claimant's subjective allegations of pain and functional limitations, although she is not required to accept those allegations at face value and may reject them where they are unsupported by the medical evidence, treatment history, and activities of daily living. *See Avery v. Sec'y of Health & Human Servs*, 797 F.2d 19, 22-23 (1st Cir. 1986); *Frustaglia v. Sec'y of Health &*

Human Servs., 829 F.2d 192, 194-95 (1st Cir. 1987); *Winn v. Heckler*, 762 F.2d 180, 181 (1st Cir. 1985); 20 C.F.R. §§ 404.1529, 416.929. The administrative law judge, however, is not required to accept subjective complaints at face value; rather, the judge must measure such complaints against the record as a whole. *See Frustaglia*, 829 F.2d at 194-95; *see also Cashman v. Shalala*, 817 F. Supp. 217, 225 (D.Mass 1993) ("Issues of credibility and the drawing of permissible inferences from evidentiary facts are the prime responsibility of the [Commissioner].").

Here, Plaintiff contends that the ALJ violated *Avery*'*s* mandate by not including a word in her decision about the "type, dosage, effectiveness or adverse side effects" of several medications he has taken for pain, muscle spasms and inflammation. That is the third of six factors which the First Circuit requires administrative law judges to consider. *Avery*, 797 F.2d at 29.

The pain medications listed in Plaintiff's memorandum, however, are ones he had taken in the past but, based on the court's review of the record, no long appeared used by him at the time of the administrative hearing. In fact, in response to the ALJ's question about what he currently did to manage pain, Plaintiff testified that he only took over-the-counter medication. (A.R. at 30-32.) The ALJ then questioned Plaintiff extensively as to why, considering the level of pain he described, he had not sought further pain management treatment or medication, to which Plaintiff responded that he "just deal[s] with [the pain] day to day."[1]

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[1]Q: [ALJ] So what are you doing?

A: [Plaintiff] Now?

As an initial matter, the court concludes, as it has in the past, that "there is no requirement in *Avery* that compels an administrative law judge to include a comprehensive analysis in the decision itself." *Deforge v. Astrue*, 2010 WL 3522464, at

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> Q: Yeah.
>
> A: I'm, I take over-the-counter medications and I just deal with it day-to-day.
>
> ...
>
> Q: And how come your primary care doctor that you've been seeing doesn't, if the pain is as severe as you say it is –
>
> A: Narcotic pain medication, you know, I mean –
>
> Q: - - there are all kinds of things they do besides ... narcotic pain medication
>
> A: Right ... He has sent me to an acupuncturist and I tried to make an appointment with one ...
>
> ....
>
> Q: So either you haven't been going to other back doctors - - I don't understand why you're not getting treatment
>
> ...
>
> A: I was on narcotic painkillers after my back operation and then they stopped prescribing them because, I mean those, those bring on their own problems
>
> ...
>
> Q: It doesn't make sense to me that you're walking around in seven-level pain ... and not saying anything to anybody about it. I mean, why would you be satisfied with that?
>
> A: I've had the pain since the early '90s and I, I, I guess I've built up a tolerance to the pain itself, you know...

(A.R. at 30-34.)

*9 (D.Mass. Sept. 9, 2010). Here, the record shows that Plaintiff provided information about medication he had taken over the years, including the name, purpose, prescribing physician and side effects, but testified at the hearing that he currently took an over-the-counter pain reliever only. (A.R. at 30-32; *see also id.* at 92-93, 101, 110, 114, 121.) In light of that testimony and the ALJ's extensive inquiry into why he had not sought additional treatment, it is clear that the ALJ took into account, to the extent it was applicable, the "type, dosage, effectiveness or adverse side effects" of Plaintiff's medication. In short, the court is satisfied that the record as a whole demonstrates sufficient consideration by the ALJ of the third *Avery* factor, among others, in her subsequent decision. *See Cox v. Astrue*, 2009 WL 189958, at *10 (D.Mass. Jan.16, 2009) ("Despite the lack of detail on these issues in the written decision, the ALJ provided enough discussion of the Avery factors in that decision to demonstrate the basis on which he determined [the claimant's] credibility regarding her statements of subjective pain").

3. The ALJ's Determination on Plaintiff's Need to Sit and Stand

Plaintiff also argues that the ALJ made an error of law by not specifying how frequently Plaintiff would need to alternate between sitting and standing. In support, Plaintiff cites Social Security Ruling ("SSR") 96-9p which, in pertinent part, provides that the residual functional capacity assessment "must include a narrative that shows the presence and degree of any specific limitations and restrictions, as well as an explanation of how the evidence in file was considered in the assessment." Courts have generally determined that "SSR 96-9p requires that the frequency of the need to

sit and stand be specified." *Wasilauskis v. Astrue*, 2009 WL 861492, at *5 (D.Me. March 30, 2009).

Plaintiff fails to acknowledge, however, that SSR 96-9p concerns sedentary work. *See Grey v. Astrue*, 2010 WL 3957392, at *2 n.3 (D.Me. Oct. 6, 2010) ("SSR 96-9p expressly pertains to sedentary work"). Here, the ALJ determined that Plaintiff was capable of performing light work and, therefore, the standards of SSR 96-9p are not properly invoked. *See Hodge v. Barnhart*, 76 Fed. App'x 797, 800 (9th Cir. 2003) ("Ruling 96-9p does not apply to light work."). In any event, even if applicable, SSR 96–9p does not "preclude the use of a term describing the alternating of sitting and standing at will, rather than at specific intervals of elapsed time." *Sprague v. Astrue*, 2011 WL 1253894, at *4 (D.Me. March 30, 2011) (quoting *Cutting v. Astrue*, 2010 WL 2595144, at *2 (D.Me. June 23, 2010)). Thus, the term "at will" is sufficiently indicative of the frequency with which a claimant could sit and stand and, here, the ALJ, in her hypothetical, stated that very standard, *i.e.*, that Plaintiff "should be allowed to sit and stand at will." (A.R. at 14-15.) That was sufficient for present purposes.

4. The ALJ's Findings Regarding Plaintiff's Residual Functional Capacity

An administrative law judge is responsible for determining a claimant's residual functional capacity based on the relevant evidence provided. *See* 20 C.F.R. §§ 404.1545, 404.1546. The administrative law judge is also responsible for evaluating the amount of controlling weight to give to both treating and nontreating physicians:

> Generally, we give more weight to opinions from your treating sources If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable

> clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. § 404.1527 (d) (2). Here, Plaintiff argues, the ALJ failed to abide by these provisions.

The court disagrees. Granted, the ALJ did not give the reports of Dr. Nathan Zemel "controlling evidentiary weight" (A.R. at 16), but that was because Dr. Zemel was only consulted for purposes of Plaintiff's disability claim and, as such, was a "nontreating source" whose opinion is not entitled to such weight. 20 C.F.R. §§ 404.1502, 404.1527. The ALJ also found that Dr. Zemel's conclusions were not "'well-supported" and, as well, "inconsistent" with the other substantial evidence in the case. For example, Dr. Zemel's diagnosis of Plaintiff's restrictive knee pain on February 20, 2008, (*id.* at 290), was in direct conflict with the determination of Plaintiff's treating physician, Dr. Joseph Sklar, and could, in the court's view, appropriately be found to be inconsistent with the other medical evidence. (*Id.* at 246.) Furthermore, Dr. Zemel's diagnosis of injuries causing "permanent loss of function" (*id.* at 290) was in direct conflict with Dr. Charles Mick, who treated Plaintiff for the coccydynia and found that Plaintiff's lumbar pain was "tolerable" (*id*. at 304-05) as well as the opinion of Plaintiff's treating physician, Dr. Savvas Papazoglou (*see, e.g., id.* at 171-73, 186). Given this evidence, the ALJ, in the court's estimation, reasonably determined that Plaintiff had the residual functional capacity to perform jobs that existed in significant numbers in the national economy.

IV. CONCLUSION

For the reasons stated, Plaintiff's motion for judgment on the pleadings is DENIED and the Commissioner's motion to affirm is ALLOWED.

DATED: August 19, 2011

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
U.S. Magistrate Judge